

Appeal from Order No 405 of 95

Date of decision: 05/02/96

SURAT TEXTILE TRADERS COOPERATIVE BANK LTD.

vs

ATUL CHANDRAVADAN SHAH & 3

APPEAL FROM ORDER NO.405 OF 1995.

Date of Decision:2/5-2-1996

For approval and Signature:

THE HON'BLE MR. JUSTICE K.R.VYAS

1. Whether Reporters of Local Papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of judgment ?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India,1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge ?

Mr.Dhirendra.K.Mehta, Advocate for the Appellant.

Mr.C.J.Vin, Advocate for respondents Nos. 1 and 2

Mr.M.G.Nagarkar, Advocate for respondents Nos.3 and 4.

CORAM;K.R.VYAS,J.

February 2/5,1996

ORAL JUDGMENT :

This Appeal From order under Order 43, Rule 1(a) of the Civil Procedure Code arises out of the order dated 27-4-95 passed by the learned 4th Joint Civil Judge (S.D.),

Surat, below Application, Ex.57, in Special Civil Suit No.178/93 holding that the Civil Court has no jurisdiction to decide the suit . Consequently, therefore, the plaint was ordered to be returned to be presented to the Court in which the suit should have been instituted under Order 7 Rule (10) of the CPC. With a view to appreciate the issue involved in the present appeal in its proper perspective, the relevant facts need to be stated.

The Surat Textile Traders Cooperative Bank Limited , the original plaintiff is a cooperative society registered under the provisions of the Gujarat Cooperative Societies Act,1961 . By an agreement dated 4.7.1991, respondent No.1 was appointed as an agent to collect daily deposits for and on behalf of the appellant bank. It is the case of the appellant bank that respondent No.1 was supposed to deposit the amounts so collected from the depositors with the bank and to make repayment thereof on maturity to the depositors. It appears that respondent No.1 got employment elsewhere and therefore,he could not continue the said agency in his name with the result, he requested the appellant bank to transfer or enter into a fresh agreement of agency with his brother-in-law,respondent No.4 herein. The appellant bank accordingly entered into agreement of agency with respondent No.4 on 12.8.1991 and Respondents Nos.2 and 3 stood as guarantors and witnesses.

It is the case of the appellant bank that after about a period of 20 months,it received complaints from the depositors that they are not paid the amounts of deposits on their maturity and on inquiry, it was found that respondents Nos. 1 and 4 have misappropriated the amounts to the extent of Rs. 3,00,000/-. It appears that on 16.4.1993, the present suit viz.Special Civil Suit No. 178 of 1993 was filed by the appellant bank against the respondents in the court of learned 4th Joint Civil Judge (Senior Division) Surat,for recovery of the said amounts alleged to have been misappropriated by the respondents alongwith 18% interest thereon with costs. The appellant bank also applied by an application,Ex.5 for an injunction restraining the respondents from transferring in any manner the respective bungalows of respondents Nos.2 and 3 and also prayed for attachment before judgment and other reliefs.

The learned trial Judge granted ad-interim injunction against transfer and/or alienation of the properties in any manner during the pendency of the suit and issued a show cause notice as to why further reliefs should not be granted against the plaintiff.

Respondents nos.1 and 2 instead of filing written

statement to the suit or a reply to the application Ex.5, filed an application ex. 57 praying inter alia for return of the plaint on the grounds contending inter alia that the civil court has no jurisdiction to entertain the suit since notice under Section 167 of the Act was not issued before filing of the said suit and the nature of dispute raised in the suit can only be entertained by the Board of Nominees under Section 96 of the Act. The appellant bank filed its reply at Ex.63 denying the aforesaid grounds. The learned trial Judge after hearing the parties, allowed the application ex. 57 and ordered return of the plaint for presentation to the appropriate court. Hence, this appeal.

Mr. D.R.Mehta, learned advocate appearing for the appellant has challenged both the aforesaid findings recorded by the trial court. In the submission of Mr.Mehta, the learned Judge has committed an error in interpreting the relevant provisions of law viz. Section 167 and 96 of the Act and has further misread the ratio of the judgment of this court.

Mr. Vin and Mr. Nagarkar, learned advocates appearing for the respondents on the other hand, supported the judgment of the trial court.

It is not in dispute that respondents Nos.1 and 4 have acted as agents of the appellant bank and they had agreed to do the work of collecting deposits on behalf of the bank as per the agreement entered into between the appellant bank and the respondents. On the record of the suit, except the said agreement, no other documents like appointment order or such other documents have been produced which may make the said respondents regular employees of the appellant bank. Thus, respondents Nos.1 and 4 were only agents and respondents Nos.2 and 3 stood as their guarantors. Admittedly, they were not the members of the appellant bank. In view of this, the question that arises for consideration of this court is whether the appellant bank is entitled to file the suit in a regular civil court or has to take recourse to Section 96 of the Act. Section 96 deals with disputes and it reads as under :

"96 Disputes : (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or business of a society shall be referred in the prescribed form either by any of the parties to the dispute or by a federal society to which the society is affiliated, or by a creditor of the society to the Registrar if the parties thereto are from amongst the following:

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society or a society which is a member of the society,

(c) a person other than a member of the society, who has been granted a loan by the society, or with whom the society has or had transactions under the provisions of section 46, and any person claiming through such a person;

(d) a surety of a member, past member or a deceased member, or a person other than a member who has been granted a loan by the society under section 46, whether such a surety is or is not a member of the society;

(e) any other society, or the liquidator of such a society.

(2) When any question arises, whether for the purposes of sub-section (1) a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final.

Explanation I.- For the purposes of this sub-section, a dispute shall include-

(i) a claim by a society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, without such a debt or demand be admitted or not;

(ii) a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower, whether such a sum or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member, or deceased member, by any officer, past officer or deceased officer, by any agent, past agent or deceased agent or by any servant, past servant or deceased servant, or by its committee, past or present whether such loss be admitted or not;

(iv) a refusal or failure by a member, a past member or nominee and/or legal representative of a deceased member to deliver possession to a society of land or any other asset resumed by it for breach of conditions of the

assignment.

Explanation II-For the purposes of this section, the expression "agent" includes in the case of a housing society, an architect, engineer or contractor engaged by the society."

Clauses (a) to (e) of sub-section (1) of Section 96 of the Act, therefore, make it abundantly clear that disputes touching the constitution, management or business of a society would be referred to and resolved by the Registrar by resorting to a special procedure by any of the parties to the dispute as enumerated therein . Clause (a), inter alia, refers to a society, its committee, any past committee, any past or present officer, any past, or present agent, any past or present servant . Clause (b) refers to a member, past member or a person claiming through a member, past member or a deceased member of a society. Clause (c) consists of two parts. First part speaks of a person other than a member of the society who has been granted a loan by the society. The second part refers to a person other than a member of the society with whom the society has or had transactions under the provisions of section 46 of the Act. Reading clauses (a),(b) and (c) of sub-section of section 96, it is clear that certain specified categories of non-members are mentioned in those clauses whose disputes are liable to be resolved in accordance with the special procedure set out in the said provisions and the rest would be governed by the ordinary procedure. This Court in *Rasiklal vs Kailashgauri* (1971) 12 GLR 355 interpreted sections 96 to 102 of the said Act while considering the question as to whether the provision prescribing special machinery for adjudication of the disputes is violative of Articles 14 and 19(1)(f) of the Constitution. The said decision of this Court disposed of two petitions filed before this Court , one relating to the dispute between the society and its members and the other relating to the dispute between the society and its non-members. Since in the present case the dispute which arises is between the appellant-bank which is a cooperative society and its non-members, it would be convenient to refer to the facts of the second petition filed before this Court . In that case, the petitioner was admittedly at no material time an existing or past member of the respondent-society therein. Certain dispute arose between the petitioner and the respondent-society out of a contract resulting from acceptance of the petitioner's bid for purchase of a lot of timber. The society alleged that the petitioner, non-member, had taken delivery of the timber purchased by him but had failed to pay the full purchase price and a sum of Rs. 1978.19 still remained to be paid by him. The society applied by an application made to the Registrar for referring

the dispute arising out of non-payment of this amount for adjudication under section 96. The claim as originally formulated was made against the petitioner's son since the contract was transferred to the son's name at the instance of the petitioner but realising that the real party liable for the dues was not the son but the petitioner himself, the respondent-society applied to the Registrar for amending its claim and the amendment being allowed, the claim as finally referred to the nominee by the Registrar was a claim against the petitioner. The nominee by his award dated 21st July, 1967, upheld the claim and directed the petitioner to pay to the respondent-society a sum of Rs.1978.19 with interest thereon at the rate of 9% per annum from 30th November, 1964. The petitioner being aggrieved by the award preferred an appeal but the Co-operative Tribunal by an order dated 31st December, 1968 rejected the appeal. Hence the petition was filed at the instance of the petitioner. The constitutional validity of sections 96 to 102 of the Act was challenged on the ground that the said provisions are violative of equal protection contained in Article 14 inasmuch as they make unjust discrimination between litigants having disputes with co-operative societies and other litigants whereas the ordinary procedure for adjudication of disputes by civil courts according to the Code of Civil Procedure is available to other litigants, the benefit of such procedure is denied to litigants having disputes with co-operative societies and a special procedure is provided for them which is less advantageous than the ordinary procedure: this discrimination made between litigants having disputes with co-operative societies and other litigants is not based on any intelligible differentia having rational relations to the object of the legislation. The second ground of challenge was to the effect that the said provisions in so far as they provide a special procedure for non-members having disputes with co-operative societies are in any event violative of Article 14 inasmuch as all non-members though similarly situate as regards the subject matter of the legislation are not uniformly treated: non-members who are creditors of a co-operative society or who have disputes arising out of investment of his funds made by a co-operative society under the provisions of section 71 or who have transactions with a co-operative society which are not " transactions under the provisions of section 46" are left out from the scope and ambit of the said provisions: there is no intelligible differentia distinguishing one class of non-members from the other and, in any event, if there is any differentia, it has no rational relation with the object sought to be achieved by the said provisions. Thirdly, it was contended that the said provisions are violative of Articles 19(1)(f) inasmuch as the machinery for adjudication of disputes provided in the said provisions is unreasonable.

After considering the rival submissions, the Division Bench of this Court has laid down as under:

"The application of the special procedure of adjudication to the members of the society does not involve any discrimination violative of Article 14. The provision of special machinery of adjudication of their disputes by a domestic forum is justified having regard to the object of the impugned provisions. So also the special procedure would be justified in its application to other class, namely, non-members who unlike members, officers and servants are outside qua the society. But the classification made by the legislature in regard to non-members suffers from a serious infirmity and that infirmity invalidates the classification. The special procedure is not made available to the entire class of non-members. Within the class itself, a discrimination has been made by the Legislature. The Legislature has picked out certain categories of non-members for the special procedure leaving the rest to be governed by the existing procedure. There is no intelligible differentia distinguishing non-members grouped together for the applicability of the special procedure from those left out of the group and even if some differentia can be discovered, it has no rational relation or nexus with the object of the impugned provisions. There is no rational basis on which differentiation has been made between some categories of non-members and others for applying the special procedure. There cannot be one procedure where the society is a creditor of a non-member and seeks to recover its dues from the non-member and another where the society is a debtor of a non-member and the non-member seeks to recover his dues from the society. That would be discrimination in the most vicious and abominable form and it would be unjustified from the point of view of the object of providing the special procedure. "

In view of the above it was held that clause (a) without the words, "any past or present agent" and "deceased agent" and clause (b) of sec.96 of the Gujarat Co-operative Societies Act are not violative of Article 14 of the Constitution but clauses (c), (d) and (e) and the words, "any past or present agent", in clause (a) of section 96 (1) along with Explanation II which make the provision set out in the impugned provisions applicable only to certain special categories of non-members are ultra vires and void as offending Article 14 of the Constitution. In view of this, it is clear beyond any manner of doubt that the agents, past or present, referred to in clauses (a) and (b) of section 96 (1) of the Act alongwith Explanation II also dealing with other categories of agents are kept outside the purview, whose disputes are to be decided by the forum prescribed

under section 96. Consequently, their dispute with the society are required to be resolved by the existing procedure prescribed under the ordinary law.

Mr. Vin, learned Advocate appearing for respondent No.1, after reading paragraph 12 of the judgment in Rasiklal's case (supra) submitted that the Division Bench has considered two categories of persons viz (1) members, officers and servants and (2) non-members including agents, who may have a dispute with a society. In the submission of Mr. Vin, the classification shown by the Division Bench is of those persons who have no nexus with the business of the society whereas in the present case the respondent-agents have in fact worked for and on behalf of the appellant-bank and, therefore, it amounts to touching the business of the society. Mr. Vin, therefore, submitted that in the circumstances, the dispute can be resolved only by the procedure prescribed under the Act viz by the Board of Nominees. He placed reliance on the decision of the Supreme Court in D.M.Co-operative Bank vs Dalichand AIR 1969 SC 1320. The Supreme Court in that case considered the provisions of section 91 (1) of the Maharashtra Co-operative Societies Act, 1961 which is in pari materia with section 96 of the Gujarat Co-operative Societies Act, 1961. In the said decision, the Supreme Court has explained what is "dispute touching the business of the society". The words "business" in sub-section (1) of section 91 has been used in the Act in narrower sense and it means the actual trading or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and bye-laws. Five kinds of disputes are mentioned in sub-section (1); firstly, disputes touching the constitution of a society, secondly, disputes touching election of the office bearers of a society, thirdly, disputes touching the conduct of general meetings of the society, fourthly, disputes touching the management of a society, and fifthly, disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election of office bearers, conduct of general meetings and management of a society would be treated as affairs of a society. The Supreme Court has further observed that although the nature of business which a society does can be ascertained from the objects of the society, it cannot be said that whatever the society does or is necessarily required to do for the purpose of carrying out its objects is part of its business. The word "touching" is very wide and would include any matter which relates to or concerns the business of a society but it is doubtful whether the word "affects" should also be used in defining the scope of the word "touching". The question whether a dispute touching the assets of a society would be a dispute touching

the business of the society would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose, it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. Where the society is a co-operative Bank it cannot ordinarily be said to be engaged in business when it lets out properties owned by it. Therefore, the dispute between a tenant and a member of the bank in a building which has subsequently been acquired by the Bank cannot be said to be a dispute touching the business of the Bank.

Having seen the judgment, it appears that the Supreme Court was mainly concerned with the question about the dispute touching the business of the society as per section 91(1) of the Maharashtra Co-operative Societies Act. As stated above, Section 96 (1) of the said Act enumerates various disputes. Assuming that the present dispute between the parties touches the business of the appellant bank, in view of Rasiklal's case (supra) wherein this court has taken out the class of members viz. agents whose disputes with the society can be decided by the special forum provided therein viz. the Board of Nominees under Section 96 of the Act and, therefore, the said dispute can only be decided by recourse to the ordinary procedure of civil court according to the Civil Procedure Code. It is to be noted that the Division Bench in Rasiklal's case (Supra) has in fact considered the D.M. Cooperative Bank's case (Supra) and, therefore, I see no merits in the submission of Mr. Vin. Mr. Vin further placed reliance on the decision of the Supreme Court in M/s A.V.R. & Co. vs. Fairfield Co-operative Housing Society Ltd. AIR 1989 SC 81, wherein the Supreme Court held section 91(b) of the Maharashtra Co-operative Societies Act as not ultra vires Articles 14 and 19 of the Constitution and that the dispute between a co-operative society and non-member claiming through a member of the society as provided in section 91(b) of the Maharashtra Act can be decided by the Co-operative Court. It is further held that this classification has got nexus to the object of the Act namely the special procedure is applicable only to those non-members claiming through a member of the society as they form a different class and that such a classification has a reasonable and rational nexus with the object sought to be achieved by the Act. Mr. Vin submitted that in view of this decision of the Supreme Court, which is later in point of time than the decision of this Court in Rasiklal's case (supra), this Court should dismiss this appeal from order.

Reading the said judgment of of the Supreme Court, it appears that the Supreme Court has taken a view that a dispute between a co-operative society and a non-member claiming through a member of the society as provided in section 91(b) of the Maharashtra Act can be decided by the Co-operative Court as this classification has got nexus to the object of the Act , namely the special procedure as applicable to those non-members claiming through a member of the society. However, it is to be noted that the Supreme Court has not over-ruled the decision of this Court in Rasiklal's case (supra) . On the contrary the said judgment is approved by the Supreme Court when in paragraph 12 has referred to the judgment of this Court in Rasiklal's case wherein this Court, as stated above, held clause (b) of section 96(1) of the Gujarat Co-operative Societies Act, 1961 which corresponds to section 91b) of the Maharashtra Co-operative Societies Act as valid though clauses (c), (d) and (e) of section 91(1) were held as ultra vires. I am, therefore, of the opinion that the aforesaid decision of the Supreme Court in M/s A.V.R. & Co. vs Fairfield Co-operative Housing Society Ltd (supra) referred to and placed reliance upon by Mr. Vin does not help the cause represented by him in this appeal. In view of this, the learned trial Judge was in error in allowing the application, Ex.57, returning the plaint and has thereby committed an error in holding that the Civil Court has no jurisdiction to decide the dispute.

The learned trial Judge has also committed an error in holding that as the plaintiff has not given a notice under section 167 of the Act, the institution of the suit itself is illegal. Reading section 167 of the Act, it clearly transpires that the said notice is required to be given where the suit is required to be filed against a society, and when the society files the suit, it is not obligatory on its part to give a notice. Since the trial Court has not understood this difference and has erroneously recorded the finding consequently this finding is also required to be set aside.

In the result, this appeal is allowed with costs. The order dated 27-4-95 passed below Application, Ex.57, in Special Civil Suit No. 178/93 by the learned 4th Joint Civil Judge (S.D.) , Surat is set aside. Considering the facts and circumstances of this case, the learned trial Judge is directed to hear and decide the suit as expeditiously as possible and preferably within one year from the date of the receipt of the writ from this Court and in accordance with law .

Rule is made absolute in the civil application
No.4542/95 with costs.
